Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application

HIGH COURT (TAWAU) — CIVIL SUIT NOS T73 OF 1991 AND T(22)-62 OF 1992
IAN HC CHIN JC
19 JULY 1993

Civil Procedure *— Stay of execution — Summary judgment — Inherent jurisdiction of court to grant stay where there were special circumstances — What constitutes special circumstances*

Revenue Law *— Corporation tax — Appeal — Stay of execution — Whether effect of s 103(1) of the Income Tax Act 1967 was to restrict inherent jurisdiction of court to stay execution — Income Tax Act 1967 s 103(1)*

Revenue Law *— Corporation tax — Appeal — Stay of execution — Special circumstances — Delay in hearing of appeal by special commissioners through no fault of defendants — Whether successful appeal would be rendered nugatory by refusal to stay action — Income Tax Act 1967 s 103(1)*

The defendants, Datuk Haji Kadir Mohamad Mastan ('Mastan') and Jasanusa Sdn Bhd ('Jasanusa'), in two separate appeals, had disputed the tax assesments of the plaintiff which were issued by the Inland Revenue Department ('the IRD'). The defendants had appealed against their assessments and had submitted the necessary forms for appeal to the Director of the IRD ('the Director') to refer the appeal to the special commissioners of the IRD. Meanwhile, the plaintiff took out separate writs against the defendants and obtained summary judgment against them. The defendants filed separate applications for stay of execution but, as both applications pertained to the same legal principles, they were heard together.

Held, allowing both applications:

(1) Though the court has an unfettered discretion whether to grant or refuse a stay of execution, the discretion must be exercised on established judicial principles. A stay would be granted if there were special circumstances, notwithstanding that the tax was due and payable under s 103(1) of the Income Tax Act 1967 ('the Act'). There are myriad circumstances that could constitute special circumstances.

(2) It is not disputed that s 103(1) of the Act provides for the assessed amount to be due and payable upon service of the relevant notice irrespective of whether there is any appeal, but the Act does not have any provision curtailing or restricting the inherent jurisdiction of the court to stay an execution. If it was a policy of the Act that the assessed tax ought to be paid first before the hearing of an appeal, then that policy was only one of the factors to be considered but it could not have primacy of consideration and would have to

give way to cases where the appeal was not heard through no fault of the taxpayer.

(3) In both cases here, there was substance in the appeal and it was no fault of the defendants that their appeals were not yet heard by the special commissioners and the court ordered a stay of execution which was to last for six months with the possibility of an extension of time if the court is satisfied on the adjourned date of hearing, in Mastan's case, that in the event of the Director of the IRD ('the Director') continuing to refuse to refer the appeal to the special commissioners, the defendant had taken the necessary legal action to have that dispute adjudicated; and, in Jasanusa's case, that the defendant had done all that it could to comply with all reasonable requests of the Director for information and documents or that the defendant had unequivocally stated that they would rely only on whatever information and documents they had already supplied for the purpose of their appeal to the special commissioners.

Per curiam:
Matters of this nature involve, inter alia, balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

[Bahasa Malaysia summary

Defendan, Datuk Haji Kadir Mohamad Mastan ('Mastan') and Jasanusa Sdn Bhd ('Jasanusa'), dalam dua rayuan berasingan, telah mempertikaikan taksiran cukai plaintif yaang dikeluarkan oleh Jabatan Hasil Dalam Negeri ('Jabatan itu'). Defendan telah membuat rayuan terhadap taksiran mereka dan telah menyerahkan borang rayuan yang berkenaan kepada pesuruhjaya khas Jabatan itu. Sementara itu, plaintif telah mengeluarkan writ berasingan terhadap defendan dan telah mendapat penghakiman terus terhadap mereka. Defendan telah memfailkan permohonan berasingan untuk penggantungan pelaksanaan, tetapi oleh kerana kedua-dua permohonan itu berkenaan dengan prinsip undang-undang yang sama, mereka telah didengar bersama.

Diputuskan, membenarkan kedua-dua permohonan:
(1) Walaupun mahkamah mempunyai budi bicara yang tidak dibelenggu sama ada untuk membenarkan atau menolak

penggantungan pelaksanaan, budi bicara itu mestilah digunakan mengikut prinsip kehakiman yang dimantapkan. Penggantungan akan dibenarkan jika terdapat keadaan khas, meskipun cukai itu perlu dibayar di bawah s 103(1) Akta Cukai Pendapatan 1967 ('Akta itu'). Ada banyak keadaan yang boleh merupakan keadaan khas.

(2) Tidak dipertikaikan bahawa s 103(1) Akta itu memperuntukkan bahawa amaun yang ditaksirkan perlu dibayar apabila notis yang relevan disampaikan, tidak kira sama ada terdapat sebarang rayuan, tetapi Akta itu tidak ada peruntukan yang membatas atau mengehadkan budi bicara sedia ada mahkamah untuk menggantungkan suatu pelaksanaan. Jika polisi Akta itu adalah bahawa cukai yang ditaksirkan patut dibayar dahulu sebelum pendengaran rayuan, polisi itu hanya menjadi salah satu daripada faktor yang dipertimbangkan tetapi tidak boleh diberikan pertimbangan utama and terpaksa memberi jalan kepada kes di mana rayuan tidak didengar bukan kerana kesalahan pembayar cukai.

(3) Dalam kedua-dua kes di sini, terdapat isi dalam rayuan dan tidak merupakan kesalahan defendan bahawa rayuan mereka masih belum didengar oleh pesuruhjaya khas and mahkamah memerintahkan penggantungan pelaksanaan selama enam bulan dengan kemungkinan pelanjutan masa jika mahkamah berpuas hati pada tarikh perbicaraan yang ditangguhkan, dalam kes Mastan, jika Pengarah Jabatan ('Pengarah itu') masih enggan merujuk rayuan itu kepada pesuruhjaya khas, defendan telah mengambil tindakan guaman yang perlu untuk mengadjudikasi perkara itu; dan dalam kes Jasanusa, defendan telah membuat apa yang ia boleh untuk mematuhi permintaan Pengarah itu untuk maklumat dan dokumen ataupun defendan telah menyatakan dengan jelas bahawa mereka hanya akan bergantung kepada sebarang maklumat dan dokumen yang telah mereka bekalkan bagi tujuan rayuan mereka kepada pesuruhjaya khas.

Per curiam:

Perkara seperti ini melibatkan, antara lain, pengimbangan keperluan kerajaan untuk merealisasikan cukai dan keperluan pembayar cukai untuk dilindungi daripada pentaksiran yang salah atau arbitrari. Mahkamah hendaklah sentiasa berjaga-jaga terhadap pembayar cukai yang mungkin menggunakan prosedur mahkamah, seperti memohon untuk penggantungan pelaksanaan, untuk menangguh bayaran diusnya yang kena dibayar atau untuk melarikan diri melalui penghijrahan atau untuk melesapkan aset supaya mengecewakan penghakiman. Mahkamah juga harus mengingati kemungkinan taksiran yang arbitrari dan salah, yang diakibatkan oleh pegawai yang mungkin membuat kesilapan, yang mesti mencapai matlamat mengutip sejumlah cukai yang telah dideklarasikan secara umum dan yang taksirannya, oleh kerana itu, mungkin dipengaruhi oleh sasaran yang hendak dicapai dan bukan oleh ketetapan taksiran itu.]

Notes

For cases on payment of tax pending dispute, see 10 *Mallal's Digest* (4th Ed) paras 1505, 1637–1641.

For cases on stay of execution, see 2 *Mallal's Digest* (4th Ed) paras 976–987.

Cases referred to

1 *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126 (refd)
2 *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 (refd)
3 *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406 (refd)
4 *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (refd)
5 *Government of the Federation of Malaysia v Haji Ghani Gilong* [1993] 1 MLJ 359 (refd)
6 *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 (refd)
7 *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 (refd)
8 *Government of Malaysia v Mechanical Handling Engineering (M) Sdn Bhd* (Supreme Court Civil Appeal No 01–72 of 1990) (unreported) (distd)
9 *Commonwealth of Australia v Cook* [1940] 1 AITR 551 (refd)
10 *Deputy Federal Commissioner of Taxation v Roma Industries Pte Ltd* [1976] 6 ATR 54 (refd)
11 *Deputy Federal Commissioner of Taxation v Mackay* (1982) 82 ATC 4571 (refd)
12 *Deputy Commissioner of Taxation (Vic) v Trevaskis* (1984) 15 ATR 867 (refd)
13 *Deputy Federal Commissioner of Taxation v Brewer* (1987) ATC 4560 (refd)
14 *Yamamori (Hong Kong) Ltd v Davidson & Ors* [1992] 2 MLJ 410 (refd)

Abu Samah bin Nordin (Senior Federal Counsel) for the Government of Malaysia.

Mirdin Mamdin (*Chin, Mirdin & Co*) for Datuk Haji Kadir Mohamad Mastan.

Paul Kan (*Paul Kan & Co*) for Jasanusa Sdn Bhd.

Cur Adv Vult

Ian HC Chin JC:

I *The applications*

The applications herein are for a stay of execution. Since the two applications pertain to the same legal principles they were heard together. The Suit No T73 of 1991 will hereinafter be referred to as 'the Mastan case' and Suit No T(22)–62 of 1992 as 'the Jasanusa case'. The facts of both cases are not in issue and the issue is whether the facts amount to special circumstances justifying a stay. I will first set out the history and facts of the two cases.

II *Facts of case*

The Mastan case

Summary judgment was obtained against the defendant on 6 April 1993 for the sum of RM286,002.24 which sum was for taxes additionally assessed to be paid for the years of assessment of 1974, 1975 and 1976, including statutory penalties. The defendant, on 13 April 1993, took out the present application for a stay and in support thereof caused to be filed: (i) two affidavits affirmed by the defendant Datuk Haji Kadir Mohamad Mastan on 12 April 1993 and on 12 June 1993; (ii) an affidavit affirmed by Thayaparan Rasiah on 14 June 1993; and (iii) an affidavit affirmed by Vincent Chia Ka Soon affirmed on 17 June 1993. The facts that can be gleaned from these affidavits can, after some effort, be summarized as follows. Sometime in July 1977, the plaintiff, the Government of Malaysia, served on the defendant, notices of additional assessments for the years of assessment of 1974, 1975 and 1976. The defendant's tax agent, by a letter dated 13 July 1977 and addressed to the Director of Inland Revenue ('the Director'), disagreed with the additional assessments on the grounds that the money earned from the sale of timber had been utilized for development purposes. The letter also requested a standover of the payment of the taxes additionally assessed. The agent also asked for the appeal form (Form Q) to be sent to the defendant. The Director replied by a letter of 8 August 1977 and maintained that the said proceeds of sale were liable to tax because the development was not carried on the land where the timber were extracted and sold but instead, on another piece of land. He however agreed to stand over the tax because there was a case on the same issue pending before the special commissioners. The matter was therefore put in abeyance until 2 April 1988 when the plaintiff wrote to the tax agent of the defendant to inform them that the special commissioners had, on the 29 March 1988, decided that '"the net proceeds" paid by the appellant to the trust account fund were not outgoings and expenses wholly and exclusively incurred in the production of gross income and therefore *not deductible* under s 33(1) of the Income Tax Act 1967, alternatively if payment of "net proceeds" were outgoings and expenses, *they constituted expenditure of a capital nature*'. The letter concluded with a demand for payment of the taxes. The tax agent replied by a letter dated 5 July 1988 and maintained that the taxes were not payable, giving the reason that the said decision of the special commissioners was on different facts and circumstances. The Form Q was again requested for and it was intimidated in the letter that the defendant wished to have the issue resolved by the special commissioners. The deputy director despatched to the tax agent the Form Q by a letter of 20 July 1988. The tax agent did not submit to the Inland Revenue the Form Q until 3 April 1991. On 3 September 1991, the tax agent submitted the amended Form Q to the Director and requested the Director to forward the appeal to the special commissioners. On 26 September 1991, the writ herein was taken out. The writ was served on the defendant on 17 October 1991. Judgment in default of defence was entered on 5 October 1992 but was, by consent, set aside on 9 February

1993. The defendant's advocate, on 27 March 1993, wrote to ask that an earlier hearing be obtained for its appeal to the special commissioners. Summary judgment was entered on 6 April 1993. The plaintiff, by a letter dated 7 May 1993, replied to the defendant's advocate's letter to say that the additional assessments would not be changed and that the appeal had not been forwarded to the special commissioners. Those are the facts in the Mastan case which facts, because they are strewn about and not set out in a chronological order, I had to burrow from the said affidavits and exhibits, skipping from one affidavit to three others, in order to follow the chronological order of the events and the documents, and to set them out in the orderly fashion I had done. I will now set out the facts of the Jasanusa case.

The Jasanusa case

By two notices of assessment, both dated 4 January 1990, one in respect of the year of assessment of 1984 and the other of 1986, the defendant was assessed to pay, respectively, RM3,183,717.50 and RM2,492,609.85. These notices of assessment were served on the defendant but it cannot be ascertained as to when they were served. From what had been produced, it would seem that the defendant's first response was by way of a letter dated 21 September 1990. This letter was not produced but was referred to in a reply dated 15 November 1990 from the Inland Revenue Department (Inland Revenue) to the defendant's tax agents. This letter of the Inland Revenue requested from the defendant: (i) a list of the vehicles, their registration numbers, chassis numbers, types, engine power, costs, dates of purchase, dates of sales, the names, identity card numbers and addresses of the purchasers and the sale prices; (ii) a letter from the Road Transport Department certifying the vehicles to have been registered in the defendant's name; and (iii) copies of the hire-purchase/leasing agreements. The tax agent replied, by a letter of 26 March 1991, supplying letters of the Forestry Department, documents of the Road Transport Department and lists relating to the ownership, registration numbers, chassis numbers and engine horse-power of some 48 vehicles. The tax agents' said letter ended by stating:

> Since the vehicles were sold many years ago, our client could not obtain any vehicle registration cards or letters from the Forestry Department or JKJR to substantiate their ownership over the rest of the vehicles. However, efforts are (being) made to obtain confirmation letters from the relevant buyers and these will be forwarded to you if any are received.
>
> Based on documents now enclosed, we shall be pleased if you could finalize our client's tax affairs for the assessment years of 1984 and 1986 as soon as possible.

Nothing happened after the said letter until 17 February 1992, when the defendant filed the Form Q to which the plaintiff reacted by a letter of 15 May 1992 which reads:

> We have received the Form Q. The Director General (intends) to review the assessment under s 101 (1).
>
> You are hereby directed to furnish the following particulars in respect of your claim of capital allowances:

2.1 List of all the assets along with the date of purchase and documentary evidence of ownership.
2.2 The documentary evidence of use in the company.
2.3 In addition to the above you are hereby requested (to produce) all books of accounts to show and (confirm) the ownership.

2 Please note that in the absence of the above documentary evidence, the DG may not amend the notice of assessment.
3 It is proposed to hold a follow-up meeting on Monday, 25 May 1992, at 10am in our office. The presence of the board of directors is essential.

It appears that simultaneously, another letter dated 15 May 1992 was also issued by the Inland Revenue to the defendant requesting for: (i) schedule of export sale; (ii) schedule of payment of extraction fee; (iii) schedule of payment of royalty; (iv) schedule of timber purchased; (v) schedule 'of timber licence utilized licence issued to outside agency/party utilized'; (vi) schedule of utilization of company's timber licence; (vii) schedule of purchase of fixed assets; and (viii) copies of all statements of accounts of certain banks. The tax agents appeared to have responded to the said two letters of the plaintiff dated 28 May 1992 by a letter of 8 June 1992; here again, the letter was not produced. The tax agent followed up with another letter dated 2 September 1992 and requested an extension of time, up to 9 October 1992, to submit the information and documents requested because the documents date back to 1982 and because 'certain vital information and documents from third parties' were being awaited. The plaintiff, on 4 September 1992, took out the writ herein. The tax agent, by another letter dated 8 October 1992, again asked for an extension of time, up to 30 November 1992, to supply the information and documents requested. The plaintiff served the writ on 6 November 1992 and obtained summary judgment on 2 March 1993. Those are the facts of the Jasanusa case.

I will now turn to the legal principles which set the perimeter within which the facts are to be considered and which lay down the manner in which discretions are to be exercised.

III *The legal principles*

The learned senior federal counsel, Abu Samah bin Nordin, had led me through a list of authorities, reported and unreported, for which I am very grateful. I will advert to them as well as to others not referred to by the parties. Though the court has an unfettered discretion whether to grant or refuse a stay of execution, the discretion must, nevertheless, be exercised on established judicial principles (see the Federal Court case of *Mohamed Mustafa v Kandasami (No 2)*;[1] and *Serangoon Garden Estate Ltd v Ang Keng*[2]). It will, as a rule only, grant a stay if there are special circumstances (see *Syarikat Berpakat v Lim Kai Kok*[3]). A stay will be granted if there are special circumstances, notwithstanding that the tax is due and payable under s 103(1) of the Income Tax Act 1967 ('the Act'). What, then, constitute special circumstances? It was said in *Mohamed Mustafa v Kandasami (No 2)*,[1] at p 127, that:

> One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful,

A nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

Therefore, whether a successful appeal to the special commissioners would be rendered nugatory by a refusal to stay execution, is a relevant B consideration. Another relevant consideration is the delay and the cause of the delay in the hearing of the appeal of the taxpayer to the special commissioners. See *Chong Woo Yit v Government of Malaysia*[4] and *Government of the Federation of Malaysia v Haji Ghani Gilong*.[5] Merits in the appeal is also a relevant consideration and support for this proposition can be found in the following passage in the case of *Serangoon Garden Estate Ltd v Ang* C *Keng*,[2] viz:

> If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned district judge in exercising his discretion to grant a stay; ...

D The case of *Hong Leong Finance Bhd v Hon Hoi Weng & Ors*[6] also supports the proposition and in fact, VC George J, in that case, was of the opinion that where summary judgment, as distinct from a judgment after a full trial, was obtained and there was every probability that the appeal against the summary judgment would be successful, a stay of execution should be E granted. The learned judge went further; he, after referring to, inter alia, the *Syarikat Berpakat* case,[3] said the rule regarding special circumstances should be qualified this way:

> Where a judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof) the general rule is that stay of execution F pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances.

I respectfully agree with those views of the learned VC George J. An attempt was made to define special circumstances by Raja Azlan Shah J (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong*,[7] viz:

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> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The definition only serves to emphasize the fact that there are myriad H circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what I discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised. I should, finally, refer to the unreported case of *Government of Malaysia v Mechanical Handling Engineering (M) Sdn Bhd*,[8] a decision of the learned Lim Beng

Choon J, cited by the learned senior federal counsel, and where a stay of execution was refused. It was remarked, or it was a finding of the learned judge in that case, that:

(1) the appeal was on tenuous ground;
(2) the particulars requested by the Inland Revenue were supplied as and when the defendant chose to do so;
(3) the evidence showed the defendant was able to pay; and
(4) the defendant was trying to transfer away assets.

The facts of that case are different from the facts of the cases here. *Mohamed Mustafa v Kandasami (No 2)*[1] was not referred to there. The passage, cited by the learned judge, of the Australian case of *Commonwealth of Australia v Cook*,[9] at p 552, dealt with the right to enter judgment, not with a stay of execution. As for the passage of *Deputy Federal Commissioner of Taxation v Roma Industries Pte Ltd*,[10] which was also cited by the learned judge, it dealt with the right to a winding-up order of a company whose debt was subject to appeal. Those passages, which were from cases not dealing with a stay of execution, should not be used to support the opinion of the learned judge that the court had limited power to stay an execution. It is not disputed that s 103(1) of the Act, provides for the assessed amount to be due and payable upon service of the relevant notice, irrespective of whether there is any appeal, but the Act does not have any provision curtailing or restricting the inherent jurisdiction of the court to stay an execution. When a party wishes to exercise a right to resort to the procedures of the court to enforce a judgment, that right is subject to the powers of the court which include a power under its inherent jurisdiction to stay an execution subject to established judicial principles. Therefore, if the *Government of Malaysia v Mechanical Handling Engineering (M) Sdn Bhd* case[8] should decide that primacy should be given to the fact that the assessed tax must be paid irrespective of any appeal, then I respectfully disagreed. If it is a policy of the Act, that the assessed tax ought to be paid first before the hearing of the appeal, then that policy is only one of the factors to be considered but it cannot have primacy of consideration and will have to give way to cases where the appeal was not heard through no fault of the taxpayer, like in the cases of *Chong Woo Yit v Government of Malaysia*[4] and *Government of the Federation of Malaysia v Haji Ghani Gilong*.[5] Anyway, a passage at p 4575, in the case of *Deputy Federal Commissioner of Taxation v Mackay*,[11] which was also cited by the learned judge, would appear to dispel any notion of primacy to be given to the policy of the Act to have the tax collected first as the passage speaks of two clear instances where the court had exercised its discretion to stay and they were, where there had been an abuse of position and where there was extreme personal hardship. Aside from that, various other Australian authorities cited by the learned judge support the principle that the merits of the appeal is a factor to be considered. See *Deputy Federal Commissioner of Taxation v Mackay*,[11]; *Deputy Commissioner of Taxation (Vic) v Trevaskis*[12] and *Deputy Federal Commissioner of Taxation v Brewer*,[13] which are all in line with *Mohamed Mustafa v Kandasami (No 2)*.[1]

Matters of this nature involve, inter alia, balancing the need of the government to realize the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The court should be ever vigilant against taxpayers who may use the procedure of the court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment. It should not be much of a difficulty for the court to see the genuineness of an appeal or the willingness of the taxpayer to comply with all reasonable requests of the Director, if they exist, and thus move the court to stay the execution. Having so apprised myself of the legal principles, I will now apply them to the facts and deliver my decisions.

IV *Conclusions*

It is common ground that despite s 99(1) of the Act, the Form Q, in so far as Sabah is concerned, is never filed within the time stipulated by the said section but is filed only after the Inland Revenue has distributed the Form Q and after an agreement cannot be reached between the taxpayer and the Inland Revenue as regards the amount of the tax payable. The apparent lateness in both cases in the filing of the Form Q is not to be an issue, in that no advantage will be taken of s 99(1) of the Act; this, the learned senior federal counsel had conceded.

In the Mastan case, the assessments were disputed as far back as 13 July 1977 after the service of the notices of additional assessments on the defendant in July 1977. The taxes were, with the consent of the plaintiff, stood over to await the decision, which was then pending, of the special commissioners in another case. The decision of that case was given almost 11 years later, on 29 March 1988. The plaintiff thereafter, on 2 April 1988, demanded payment of the tax to which the defendant, by a letter dated 5 July 1988, still maintained that the taxes were not payable and asked for the Form Q to enable him to formally lodge the appeal. The Form Q was despatched to the tax agent on 20 July 1988, but it was not till 3 April 1991 that the defendant lodged the Form Q, followed with a further amended Form Q on 3 September 1991, coupled with a request that the Form Q be forwarded to the special commissioners. Up to that time, the plaintiff took no steps to recover the assessed tax. Instead of forwarding the appeal to the special commissioners, the plaintiff, on 17 October 1991, took out the writ and, on 6 April 1993, obtained summary judgment.

The defendant, as regards the additional assessments, maintained that the sums, which were termed 'nett proceeds', 'should be an allowable deduction as it was expenditure incurred wholly and exclusively in producing the gross income and/or it is an expenditure allowable under s 39(1)(g) of the Act'. I am unable to agree with the learned senior federal counsel that the defendant's only contention was that the mere filing of the appeal

amounted to special circumstances. Mirdin Mamdin Esq, learned counsel for the defendant, orally submitted and contended, which is the proper thing to do, rather than in the affidavit of the defendant (see *Yamamori (Hong Kong) Ltd v Davidson & Ors*[14]), that the facts disclosed by the affidavit disclosed special circumstances and, in particular, that there was no fault on the part of the defendant that his appeal was still not heard by the special commissioners. The learned counsel also submitted that the appeal would be of 'no efficacy' if a stay was not granted. Was the defendant at fault in his appeal to the special commissioners not being heard to date? As for the period between 1977 and July 1988, the defendant was clearly not at fault because the tax was stood over and the Form Q requested by him was not then forwarded to him because of an appeal in another case which, according to the plaintiff, had a bearing on the present case. What then of the period between July 1988, when the tax agent of the defendant had received the Form Q, and just before April 1991, when the defendant submitted the Form Q? Here, there was an unexplained delay on the part of the defendant of about 21 months in submitting the Form Q. But, between the time the Form Q was lodged in April 1991, and June 1993, the Form Q, for a period of more than 25 months, had still not been forwarded by the plaintiff to the special commissioners and the reason appears in the said letter of the Inland Revenue dated 7 May 1993, which is that the Director was not going to review the assessment and hence the appeal was not sent to the special commissioners. Therefore, whatever the fault of the defendant in not returning the Form Q until April 1991, he had not, subsequent thereto, contributed to the fault in not having his appeal forwarded from April 1991 until now, which delay, is the immediate delay which the court is concerned with, and bearing in mind that the plaintiff does not insist on strict compliance with s 99(1) of the Act. Since it was not argued by the learned senior federal counsel that the appeal is frivolous, I therefore assume that there is substance in the appeal. Since there is substance in the appeal and coupled with the fact that it was no fault of the defendant that his appeal was not yet heard by the special commissioners, I grant the order of stay of execution. But what if the Director continues to refuse to submit the appeal to the special commissioners? In such an event, the court, in order not to prejudge the issue of whether the plaintiff was right in not forwarding the appeal to the special commissioners, expects the defendant to initiate the appropriate legal action to have the dispute as to whether the appeal is fit to be submitted to the special commissioners, adjudicated. For the purpose, the stay of execution is to last six months from the date hereof and will only be extended if I am satisfied on the adjourned date of hearing, upon affidavit evidence to be filed by the defendant, that, in the event of the director continuing to refuse to refer his appeal to the special commissioners, he had taken the necessary legal action to have that dispute adjudicated. The dispute regarding the tax is a simple question of law which I have earlier referred to. There is no reason why that dispute cannot be resolved with the minimum of time; if it cannot, the fault lies with the system and the defendant should not be punished for it. The summons herein is therefore adjourned to 10 January 1994, at 9am for the

purpose of determining whether the stay of execution should be extended. I will now turn to the Jasanusa case.

In the Jasanusa case, the events spanned a shorter period than the 16 years in the Mastan case. The notices of assessments were issued in January 1990, and were in respect of the years of assessment of 1984 and 1986. There were exchanges of letters between the plaintiff and the defendant regarding the taxes. The defendant endeavoured to fulfil the requests of the plaintiff for information and documents. The defendant filed the Form Q in February 1992, and the plaintiff reacted by a letter of 15 May 1992, saying that the Director intended to review the assessment under s 101 of the Act and asked for particulars of everything that the defendant owned and proof of use and of ownership. Given the mass of information and documents required, quite naturally the defendant, on two occasions, asked for time up to 30 November 1992 for compliance. Instead of acceding to the request for time, the plaintiff took out the writ herein and obtained summary judgment on 2 March 1993; at which time the Director still had not changed his stated intention to review the assessment which he indicated in his letter of 15 May 1992. Quite a substantial amount of information, in the form of documents certifying to the ownership, registration number and capacity of the vehicles, have to date already been supplied by the defendant to the plaintiff. If the Director was not happy with what he had been supplied and was not agreeable to extending the time for the defendant to supply the information and documents, he should have written to the defendant to inform the defendant that he had changed his mind about reviewing the assessment; this was not done despite the intimation by the defendant, in the said letter of 26 March 1991, that the defendant's case for review rested with whatever information and documents the defendant had, by that date, supplied. The defendant is still holding on to the hope of a review held out by the said letter of the Director which obviates the necessity of an appeal. Therefore, that the appeal of the defendant is still not heard is not the fault of the defendant. I therefore also grant a stay of execution. But in this case, the stay will be for a period of six months and will only be extended if I am satisfied, on the adjourned date of hearing of the summons herein, upon affidavit evidence to be filed by the defendant, that the defendant had done all that it could in complying with all the reasonable requests of the Director for information and documents, or that the defendant had unequivocally stated that it would rely only on whatever information and documents they had already supplied for the purpose of their appeal to the special commissioners. The evidence shows that the defendant is prepared (despite the said intimation that it is prepared to rest its case on whatever has already been supplied) but has yet to supply certain information and documents, which may result in a review of the assessments. In order not, by the order of stay, to encourage indolence on the part of the defendant in supplying further information and documents nor to provide the defendant with an indefinite legal shield to defer payment and, also, in order to assure myself that the defendant, after the grant of the stay, will make all reasonable efforts to comply with the requests of the Director or, at least, has hereafter stated unequivocally that it will not rely on any other

documents for its case for a review or appeal, a hearing, sitting six months from now, will be had to determine whether a stay by then is still justified. The summons herein is therefore adjourned to 10 January 1994, at 9am, for the purpose of determining whether the stay of execution should be extended. The parties are at liberty to file further affidavits for the purpose of the adjourned hearing.

Costs of the applications are awarded to the two defendants.

Order accordingly.

Reported by Yap Foo Ken